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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 EDITHA DAMASCO,

9 Plaintiff,

10 v.

11 UNITED STATES OF AMERICA,

12 Defendant.

Case No. C17-641 RSM

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

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14 **I. INTRODUCTION**

15 This matter comes before the Court on Defendant United States of America's Motion for
16 Summary Judgment on Plaintiff Editha Damasco's claims under the Federal Tort Claims Act, 28
17 U.S.C. § 2671 *et seq.* Dkt. #17. Neither party has requested oral argument and the Court does
18 not find oral argument necessary to resolve Defendant's Motion for Summary Judgment. Having
19 considered the parties' briefing and the relevant record, and for the reasons set forth below, the
20 Court DENIES Defendant's Motion for Summary Judgment.

21 **II. BACKGROUND**

22 In the early hours of May 26, 2013, Plaintiff was struck by a United States Postal Service
23 van driven by Deidre Stoddard. Dkt. #22-1. The collision took place at or near the intersection
24 of International Boulevard and South 188th Street in SeaTac, Washington. Dkt. #22 at ¶ 3.
25 Plaintiff was injured, suffering a broken left hip. Dkt. #24-1 at 18.
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1 At the time of the incident, Ms. Stoddard was nearing the end of her work day and was
2 returning to her work facility, turning left onto northbound International Boulevard from
3 eastbound South 188th Street. Dkt. #18-1 at 5, 7. The intersection was not overly dark and was
4 fairly well lit as “it’s a major intersection” and “[t]here’s a lot of street lights there.” *Id.* at 8.
5 Ms. Stoddard just missed the protected left turn and had to sit for a full light cycle. *Id.* at 7.
6 While waiting, she observed a group of people cross west to east over International Boulevard to
7 the north of South 188th Street and outside of the crosswalk. *Id.* at 10. Prior to making her turn,
8 she also noticed a car on westbound South 188th Street waiting to make a right-hand turn onto
9 International Boulevard. *Id.* at 7. Upon having a left turn arrow, Ms. Stoddard did not observe
10 any pedestrians in the area, checked the traffic, began her left turn, saw her lane was clear, and
11 glanced back to the car waiting on westbound South 188th Street. *Id.* at 7–8. When Ms. Stoddard
12 looked back to her path of travel, “there was someone in front of my vehicle.” *Id.* 11. Ms.
13 Stoddard swerved to the right, “brushed” Plaintiff, saw in her rearview mirror that Plaintiff had
14 fallen in the inside lane of north International Boulevard, stopped, and observed Plaintiff lying
15 10-20 feet north of the crosswalk in the inside lane on north International Boulevard. *Id.* at 12.
16 Ms. Stoddard went to help Plaintiff and later observed that her vehicle’s left front turn signal and
17 light cover were broken. *Id.* at 13–14. Ms. Stoddard maintains that Plaintiff “absolutely” was
18 not in the crosswalk at the time of collision. *Id.* at 16.

21 Plaintiff, 60 years old at the time, was just beginning her day and was walking to work
22 from her apartment. Dkt. #18-2 at 4. It was still dark out and she was wearing a green hooded
23 jacket and black pants. *Id.* at 3–5. She was not late and was walking from her apartment on the
24 south side of South 188th Street to SeaTac airport. Dkt. #24-1 at 8–9. Plaintiff walked west to
25 the southeast corner of the intersection of South 188th Street and International Boulevard and
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1 crossed north to the northeast corner of the intersection. *Id.* at 15–17. From there, Plaintiff
2 intended to cross west over International Boulevard to the northwest corner of the intersection.¹
3 *Id.* Plaintiff indicates that she “always” pushes the button to activate the pedestrian “walk signal”
4 and doesn’t cross except for when she has a walk signal. Dkt. #18-2 at 6–7. However, Plaintiff
5 does not recall if she hit the button that night or if she had a walk signal when she began crossing
6 International Boulevard. *Id.* Plaintiff began crossing International Boulevard within the
7 crosswalk, moving at a normal speed. Dkt. #24-1 at 10. Plaintiff was almost to the median
8 dividing the northbound and southbound lanes of International Boulevard when she was struck.
9 *Id.* at 12. Plaintiff did not see the Postal Service vehicle until “[i]t was already there” and “didn’t
10 notice it before.” *Id.* at 11–12. Plaintiff testifies that she was in the crosswalk and moving at a
11 normal speed the entire time she was crossing International Boulevard prior to the collision. *Id.*
12 During the collision, Plaintiff was “pushed away a bit from the” crosswalk. *Id.* at 13.

14 Defendant seeks summary judgment on the basis that its driver owed Plaintiff no duty of
15 care as she was crossing against a “do not walk signal,” was outside of the crosswalk, and did
16 not yield to Defendant’s vehicle and further because Defendant did not have an opportunity to
17 see Plaintiff and Plaintiff should have avoided the collision. Dkts. #17, 25. While noting that
18 Plaintiff’s testimony is contrary to its evidence, Defendant characterizes Plaintiff’s evidence as
19 “blatantly contradicted” and “improbable.” Dkt. #17 at 3.

25 ¹ The record is not clear as to whether Plaintiff always takes this route to get to work or whether
26 she crossed South 188th Street during the light cycle immediately prior to the accident—*i.e.* while
27 Ms. Stoddard waited. However, these are inferences that a finder of fact could draw and will be
considered here. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Sullivan v. U.S. Dep’t
of the Navy*, 365 F.3d 827, 832 (9th Cir.2004).

III. DISCUSSION

A. Standard of Review for Summary Judgment

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(A); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir.2004). However, “[t]he mere existence of a scintilla of evidence in support of the [non-moving party’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Anderson*, 477 U.S. at 251. The non-moving party must make a “sufficient showing on [each] essential element of her case with respect to which she has the burden of proof” to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Federal Tort Claims Act

The United States has waived its sovereign immunity and accepted liability “in the same manner and to the same extent as a private individual under like circumstance.” 28 U.S.C. § 2674. Likewise, the U.S. District Courts are provided exclusive jurisdiction over actions for damages “caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope” of employment. 28 U.S.C. § 1346(b)(1). The action must arise “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” *Id.* Resultantly, the United States’ liability is determined by state law, while procedural matters are governed by federal law. *See Liebsack v. United States*, 731 F.3d 850, 855 (9th Cir.2013).

C. Washington Negligence Law

In Washington, common law negligence “is the failure to exercise reasonable or ordinary care” and ordinary care is “that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions.” *Woodward v. Taylor*, 184 Wash.2d 911, 366 P.3d 432, 436 (2016) (quoting *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wash.2d 119, 426 P.2d 824, 826 (1967)). Additionally, the Washington Legislature can define a statutory “duty that is additional to, and different from, the duty to exercise ordinary care.” *Mathis v. Ammons*, 84 Wash. App. 411, 928 P.2d 431, 434 (1996). The Legislature has enacted statutory duties, but has mandated that “[a] breach of a duty imposed by statute . . . shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence.” RCW 5.40.050.

Both Plaintiff and Defendant point to statutory duties, “rules of the road,” to support their arguments. RCW 46.61.050(1) (pedestrian shall obey traffic control devices); RCW 46.61.240(1) (pedestrian crossing outside of crosswalk shall yield right-of-way to vehicles); RCW 46.61.240(4) (pedestrian shall only cross within crosswalk between adjacent intersections with traffic-control signals);² RCW 46.61.235(1) (vehicle shall stop to allow pedestrian in

² On the record, the Defendant does not even establish that RCW 46.61.240(4) applies. Defendant does not establish, and the record does not support, that the alleged location at which Plaintiff was crossing was “[b]etween adjacent intersections at which traffic-control signals are in operation.”

1 crosswalk to cross) RCW 46.61.245 (notwithstanding pedestrians' duties, "every driver of a
2 vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway"). But,
3 "a trial judge [cannot] find negligence as a matter of law merely because a statutory duty was
4 violated without excuse or justification; rather, he or she must determine whether, in light of all
5 the facts and circumstances of the case, reasonable minds could differ on whether the defendant
6 used ordinary care." *Mathis*, 928 P.2d at 435.

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8 Importantly, Washington is also a contributory fault state. RCW 4.22.005 ("any
9 contributory fault chargeable to the claimant diminishes proportionately the amount awarded as
10 compensatory damages for an injury attributable to the claimant's contributory fault, but does
11 not bar recovery"). "Whether there has been negligence or comparative negligence is a jury
12 question, unless the facts are such that all reasonable persons must draw the same conclusion
13 from them, in which event the question is one of law for the courts." *Hough v. Ballard*, 108
14 Wash. App. 272, 31 P.3d 6, 10 (2001) (citing *Shook v. Bristow*, 41 Wash.2d 623, 250 P.2d 946,
15 947 (1952)). As noted above, the determination is whether, "in light of all the facts and
16 circumstances of the case, reasonable minds could differ on whether the defendant [and plaintiff]
17 used ordinary care." *Mathis*, 928 P.2d at 435.

19 **D. Summary Judgment Is Not Appropriate**

20 Genuine disputes as to material facts preclude the Court from determining the statutory
21 duties upon Plaintiff and Defendant, much less determining that Defendant is not liable as a
22 matter of law. The applicable statutory obligations in this case change and shift depending on
23 when Plaintiff entered the intersection, whether she had a walk signal, whether she was within
24 the crosswalk, whether Ms. Stoddard exercised due care, whether Plaintiff was there to be seen,
25 and whether Plaintiff exercised due care for her own safety. Further, the Washington Legislature
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1 has provided that violation these statutory duties are merely evidence of whether a party breached
2 its common law duty to act as an ordinarily careful and prudent person would under the same or
3 similar circumstances or conditions. *Woodward*, 366 P.3d at 436. Summary judgment is not
4 appropriate in this case.

5 Foremost, the parties dispute whether Plaintiff was within the crosswalk at the time of the
6 collision. Defendant attempts to prove to the Court, on summary judgment, that Plaintiff was
7 not within the crosswalk. Ms. Stoddard testifies that Plaintiff was “absolutely” outside of the
8 crosswalk because Ms. Stoddard “was well past the crosswalk when the collision occurred.” Dkt.
9 #18-1 at 16. Defendant bolsters Ms. Stoddard’s testimony with testimony of a witness, Mr. Hall.
10 Mr. Hall was the driver of a truck following the Postal Service van and testifies similarly with
11 Ms. Stoddard that he saw “no one in the crosswalk” and that after the van completed the left turn
12 “a woman came out of the brush and ran in front of the Postal Service van.” Dkt. #20 at ¶¶ 4–5.
13 But this testimony directly conflicts with Plaintiff’s testimony that she was crossing within the
14 crosswalk. Dkt. #24-1 at 10–12. A jury could reasonably choose to believe either scenario.
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16 Defendant attempts to tip the scale with the testimony of two experts.³ Ashley Giesa, a
17 mechanical engineer, reviewed pictures taken on the night of the incident and visited the scene.
18 Dkt. #19. Ms. Giesa opines that the location of crash debris, photographed in the area where
19 Plaintiff came to rest, was at least 10 feet from the crosswalk. Dkt. #19 at ¶ 13. From this, and
20 without providing any basis, Ms. Giesa concludes that Plaintiff was crossing at least 10 feet from
21 the crosswalk. Dkt. #19 at ¶ 14. Peggy Shibata, a biomechanical and mechanical engineer,
22 opines that the nature of the crash reduced the likely “throw distance” and that the final point of
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26 ³ Defendant also relies on the report of a police officer who arrived after the collision and had no
27 personal knowledge of where the collision took place.

1 rest was “in the same vicinity” as the collision. Dkt. #21. Ms. Shibata does not quantify
2 “vicinity” and a jury could conclude that 10 feet is in the same vicinity.

3 Despite Defendant’s contention, this evidence does not blatantly contradict Plaintiff’s.
4 Plaintiff testified that she was “pushed away a bit from the” crosswalk during the collision. Dkt.
5 #24-1 at 13. Similarly, Mr. Hall testifies that Plaintiff was “clipped . . . and rolled to the side.”⁴
6 Dkt. #20 at ¶ 6. Ms. Stoddard testified that Plaintiff “was standing as my vehicle passed . . . and
7 she . . . would have lost her balance.” Dkt. #18-1 at 13. A jury could reasonably conclude that
8 Plaintiff came to rest 10 feet from the point where the collision occurred.
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10 The parties also dispute whether Plaintiff was crossing against the walk signal.
11 Defendant’s expert, Ms. Giesa, inspected and reviewed traffic signal sequence and timing for the
12 intersection and concluded that: “Plaintiff would not have had a walk signal while” Ms. Stoddard
13 had a green left turn arrow. Dkt. #19 at ¶ 9. This opinion stops short of establishing that Plaintiff
14 did not have a walk signal when she entered the intersection.⁵ Plaintiff testified that her habit is
15 to “always” activate the walk signal and that her habit is to not cross unless she has a walk signal.⁶
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20 ⁴ The Court also notes that Mr. Hall’s testimony conflicts with Ms. Shibata’s conclusion that
21 Plaintiff had no injuries consistent with her body “rolling across the roadway.” Dkt. #21 at ¶ 12.

22 ⁵ Mr. Hall’s testimony supports this conclusion, but conflicts with Plaintiff’s in other regards,
23 specifically whether she was running or walking, and a finder of fact could find him not credible.

24 ⁶ The Court entirely discounts Plaintiff’s unsupported argument that she “had to have left the curb
25 before Ms. Stoddard’s light turned green.” Plaintiff makes several unsupported assertions in her
26 Response. *See e.g.* Dkt. #23 at 8 (unsupported facts arguing that if Mr. Hall is believed, the point
27 of impact was more than 10 feet from crosswalk); *Id.* at 9 (rebutting Mr. Hall’s testimony that
Plaintiff came out of the brush by asserting, without support, that she “was not in that parking
lot”). These unsupported allegations, as contrasted by Plaintiff’s own testimony, are the type that
do not create a genuine dispute as to a material fact. Genuine disputes “requires evidence, not
speculation.” *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (1999).

1 Dkt. #18-2 at 6–7. Indeed, as Defendant notes, Plaintiff testified at the time of the accident that
2 the signal changed when she was halfway through the crosswalk.⁷ Dkt. #17 at 19.

3 The parties also genuinely dispute whether Plaintiff was running at the time of the
4 collision. Plaintiff testifies that she was walking at a normal speed. Dkt. #24-1 at 12. Mr. Hall
5 testifies that Plaintiff “came out of the brush and ran in front of the Postal Service van.” Dkt.
6 #20 at ¶ 5.

7 The record likewise demonstrates a genuine dispute as to whether Plaintiff should have
8 seen the vehicle and whether Ms. Stoddard should have seen Plaintiff before the collision. Ms.
9 Giesa determined that “it would have taken Ms. Stoddard approximately 7.7 seconds to travel to
10 the point of the impact on International Boulevard.” Dkt. #19 at ¶ 15. Ms. Shibata identifies
11 general factors (lighting, contrast, conspicuity) explaining that humans generally have more
12 difficulty seeing at night. Dkt. #21 at ¶¶ 13–18. Ms. Shibata explains that her opinion provides
13 “an explanation for why Ms. Stoddard did not perceive Plaintiff in advance of her appearing ‘in
14 front of her vehicle.’” Dkt. #21 at ¶¶ 14–18.

15 Of note, part of Ms. Shibata’s explanation is that “before and during [Ms. Stoddard’s] left
16 turn, her attention was somewhat directed toward the westbound vehicle making a right onto
17 northbound International Blvd.” *Id.* at 17. Indeed, Ms. Stoddard testified that she looked away
18 from the crosswalk as she “was nearly completed with [her] turn” and did not look back until she
19 was “well past the crosswalk.” Dkt. #18-1 at 7–8, 16. This is the case even though Ms. Stoddard
20 had just observed “a group of people that crossed . . . not in a crosswalk, and ran across the
21 street.” Dkt. #18-1 at 10.

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26 ⁷ Though this statement may be hearsay, the Court will consider it as the Defendant brought it to
27 the Court’s attention. Dkt. #17 at 19; Dkt. #25 at 9. Further, the fact that Plaintiff now does not
remember whether she had a walk signal does not conflict with her earlier statement.

1 Another part of Ms. Shibata’s possible explanation was that Plaintiff’s dark clothing may
2 not have contrasted with a “dark background.” *Id.* No evidence establishes the “background”
3 and Ms. Stoddard in fact indicated that the intersection was fairly well lit and that there are “a lot
4 of street lights there.” Dkt. #18-1 at 8.

5 In sum, Ms. Shibata provides “an explanation for why Ms. Stoddard did not perceive
6 Plaintiff.” Dkt. #21 at ¶ 18 (emphasis added). Ms. Shibata does not testify that Ms. Stoddard,
7 exercising due care, could not have seen Plaintiff.
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9 The numerous genuine disputes as to material facts go directly to determining applicable
10 statutory obligations and whether they were violated—themselves only evidence of negligence.
11 On a motion for summary judgment, the Court is not permitted to weigh the evidence or make
12 credibility determinations as these responsibilities belong to the finder of fact. *Anderson*, 477
13 U.S. at 249–50. Even if the Court could, both Plaintiff and Defendant had the duty to act
14 reasonably and with ordinary care. *Woodward*, 366 P.3d at 436. Further, Washington law is
15 clear that a driver approaching a crosswalk has a duty of continuous observation and that a
16 pedestrian, whether in the crosswalk or not, also must exercise reasonable care for her own safety.
17 *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574, 580 (1999). “The interaction between [a car
18 and a pedestrian] involves location, direction, movement, conditions, obstructions, actions,
19 observations, and numerous other inferences that may have brought about a crash” and “must be
20 assessed by the jury unless the evidence permits no inference of negligence on the part of one
21 party or on the part of the other.” *Hough*, 31 P.3d at 11 (2001) (quoting *Harris v. Burnett*, 12
22 Wash. App. 833, 532 P.2d 1165, 1168 (1975)).
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IV. CONCLUSION

Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby ORDERS that Defendant's Motion for Summary Judgment (Dkt. #17) is DENIED. The Court will address, by separate order, the parties' stipulated motion to extend pretrial dates.

DATED this 12th day of March 2018.



RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE